

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

United States of America,

*Plaintiff,*

v.

Case No. 3:07-cr-205  
Judge Thomas M. Rose

Edwin Arthur Avery,

*Defendant.*

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DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS, (ECF 62), OVERRULING PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATIONS, (ECF 63), DENYING MOTION FOR RECONSIDERATION. (ECF 60). THE INSTANT CASE REMAINS TERMINATED, HOWEVER, THE CLERK IS TO ISSUE A CERTIFICATE OF APPEALABILITY ON WHETHER A PERSON IN DEFENDANT'S POSITION IS ENTITLED TO THE BENEFIT OF THE DOUBT ABOUT WHETHER AN AMBIGUOUS PRIOR CONVICTION WAS OR WAS NOT UNDER A STATUTE THAT QUALIFIES UNDER ACCA AFTER *JOHNSON*.

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On September 29, 2016, the Sixth Circuit granted Defendant Edwin Arthur Avery permission to file a second or successive motion challenging the determination of his sentence and transferred the case to this Court. *In re: Edwin Arthur Avery*, Case No. 16-3566 (6th Cir. Sept. 29, 2016)(unpublished; copy at ECF 47.) Avery's Second Motion to Vacate was opened that same day. (ECF 48.)

On December 28, 2016, Magistrate Michael R. Merz filed a Report and Recommendations urging that Avery's Second Motion to Vacate (ECF 48) be dismissed with prejudice and a

certificate of appealability be denied. (ECF 56.) On January 20, 2017, the Court adopted the Report and Recommendations, (ECF 57), and terminated the case on February 25, 2016. (3:16-cv-002.)

On February 13, 2017, Avery filed a Motion for Reconsideration, (ECF 60), asking the Court to revisit its decision that Avery's second Motion to Vacate under 28 U.S.C. § 2255 be dismissed with prejudice. On March 1, 2017, Magistrate Judge Merz filed a Report and Recommendations on Motion to Amend the Judgment, (ECF 62), recommending that Avery's Motion for Reconsideration, (ECF 60) be denied but that he be granted a certificate of appealability permitting him to proceed on appeal *in forma pauperis* on whether a person in Avery's position is entitled to the benefit of the doubt about whether an ambiguous prior conviction was under a statute that qualifies under ACCA after *Johnson*. (Id.) On March 17, 2017, Avery objected to this Report and Recommendation. (ECF 63.)

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a *de novo* review of the record in this case, taking into consideration Defendant's objections. Upon said review, the Court finds that Plaintiff's objections, (Docs. 63), to Report and Recommendations, (ECF. 62), are not well taken and they are hereby **OVERRULED**. Wherefore, the Court **ADOPTS IN FULL** the Magistrate Judge's Report and Recommendations. (ECF 62.) The Motion for Reconsideration, (ECF 60) is hereby **DENIED**. Because the resolution of Avery's motion would be debatable among reasonable jurists, Avery is **GRANTED A CERTIFICATE OF APPEALABILITY** permitting him to proceed on appeal *in forma pauperis* on whether a person in Avery's position is entitled to the benefit of the doubt about whether an ambiguous prior conviction was under a statute that qualifies under ACCA after *Johnson*. The case remains **CLOSED** in all other respects.

**DONE** and **ORDERED** this Thursday, May 4, 2017.

s/Thomas M. Rose

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THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE